INDEX

CITATIONS

Cases:

793-774—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 21, 1965.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–9a) is reported at 348 F. 2d 682. The findings of fact and conclusions of law of the district court and the injunction and order issued by that court (App. B, *infra*, pp. 10a–25a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1965 (App. A, *infra*, pp. 1a–9a). By orders entered on October 15, 1965, and November 18, 1965,

Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2, Seventh of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees * * * as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [providing for notice, negotiation, and access to mediation before such changes are made]." The question presented is whether, while a lawful strike against a railroad carrier is in progress, the carrier may partially ignore this unqualified prohibition and institute unilateral changes in pay rates, rules or working conditions, without negotiation or mediation, on the ground that such changes are "reasonably necessary" to enable the carrier to operate during the strike.[1]

[1] In the court of appeals, an issue was also raised as to the standing of the United States to bring a suit for injunction to enforce the provisions of the Railway Labor Act. The court of appeals held that the United States does have such standing (App. A, *infra*, pp. 5a–7a). In our view, this decision was clearly correct, and we do not therefore include the standing of the United States as a question presented. However, if this petition is granted and if respondent continues to urge, as a basis for affirmance of the decision of the court of appeals, that the United States lacked standing, we shall discuss this question in the brief on the merits.

STATUTES INVOLVED

Sections 2, Seventh, and 6 of the Railway Labor Act, as amended, 44 Stat. 577, (45 U.S.C. 151 *et. seq.*) provide:

> Section 2, Seventh (45 U.S.C. 152, Seventh). *Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.*
>
> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.
>
> Section 6 (45 U.S.C. 156). *Procedure in changing rates of pay, rules, and working conditions.*
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after

termination of conferences without request for or proffer of the services of the Mediation Board.

Other pertinent provisions of the Railway Labor Act are reproduced in Appendix D, *infra*, pp. 45a–50a.

STATEMENT

I. BACKGROUND

This case arises out of a strike on the Florida East Coast Railway ("FEC"), which began in January, 1963, and which has since become the longest strike in American railroad history. The strike began after mediation had failed to settle a wage dispute between the railroad and its non-operating unions.[2]

When the non-operating unions struck on January 23, 1963, most operating employees refused to cross the picket lines.[3] The railroad temporarily shut down but, on February 3, 1963, began to resume operations by using supervisory personnel and replace-

[2] The full background of the strike is given in the Report of the Emergency Board created by the President pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. 160, in an attempt to settle the strike (Exh. Vol. 451–490). The wage dispute had originally arisen on virtually all railroads in the United States, and bargaining took place on a national basis. All carriers other than FEC ultimately reached agreement with the unions. However, prior to the time this agreement was reached, FEC withdrew from the national bargaining and proposed terms different from those offered by other carriers. FEC's proposals were unacceptable to its unions, and no agreement could be reached.

[3] "Non-operating" unions are those representing employees who do not actually operate the trains, such as machinists, telegraphers, electrical workers and clerks, whereas "operating" unions are those representing employees who run the trains, such as trainmen, engineers and firemen.

ments for the strikers and for the operating employees who would not cross the picket lines. The carrier's program of recruiting replacements was successful and, by October, 1963, FEC was carrying approximately 95 per cent of the volume of carload freight which it had carried prior to the strike (Tr. Vol. I, 182, 363). FEC did not attempt to reinstate its less profitable passenger and less-than-carload freight services (Exh. Vol. 459–460).

In reinstating carload freight service through the use of replacements and supervisory employees, FEC disregarded the existing rates of pay, rules and working conditions set forth in its collective bargaining agreements with the unions representing its employees. After it resumed operations, FEC operated under rules of its own making which were unauthorized by its agreements and which were instituted with no attempt to comply with the notice, negotiation and mediation procedures required by Section 6 of the Railway Labor Act (45 U.S.C. 156) when such changes in existing conditions are proposed. On September 1, 1963, these unilateral changes in rules and conditions were embodied in a document entitled "Conditions of Employment" (Exh. Vol. 4–35), which all new employees were required to sign before going to work (Exh. Vol. 75).

On September 24, 1963, after FEC's unilateral implementation of the new "Conditions of Employment," FEC served statutory notices on all non-operating unions, proposing to abolish the existing collective-bargaining agreements in their entirety and

to substitute a "Uniform Working Agreement" (Exh. Vol. 402–440), a slightly expanded version of the "Conditions of Employment" (Tr. Vol. I 313–321). On October 18, 1963, FEC met with the unions pursuant to the Act to discuss this proposal, but the unions objected to the presence of a court reporter brought to the conference by FEC and the meeting terminated. The unions then invoked the services of the National Mediation Board under Sections 5 and 6 of the Act but FEC insisted that it was free to implement its proposals without prior mediation because the unions had refused to bargain (Exh. Vol. 440–441.) On October 30, 1963, FEC unilaterally placed the "Uniform Working Agreement" into effect, and refused to rescind this action when, on the following day, the National Mediation Board rejected its legal position and docketed the dispute for mediation (Exh. Vol. 442–447). After October 30, 1963, employees hired by FEC were required to sign copies of the "Uniform Working Agreement" (Tr. Vol. I 283–284).

From October 30, 1963, until November 14, 1964, when the district court's injunction in this case (App. B, *infra,* pp. 20a–22a) took effect, FEC operated under the Uniform Working Agreement. FEC enjoyed a substantial increase in its operating profit during this strike period.[4]

II. THE PRESENT SUIT AND THE TRAINMEN'S CASE

The present suit was instituted on April 30, 1964, when the United States filed a complaint alleging that

[4] This is revealed by FEC's annual and quarterly reports to the Interstate Commerce Commission and by FEC's 1964 Annual Report to Shareholders, p. 20.

FEC had violated Sections 2, Seventh, and 6 of the Railway Labor Act, *supra,* pp. 3–4, by its unilateral implementation, as to its non-operating employees, of changes in rates of pay, rules, and working conditions without notice and before the termination of mediation. The United States requested that FEC be enjoined from continuing to implement such changes without having followed the statutory procedures. Hearings were held before the district court in May, 1964.

Thereafter, on August 18, 1964, the Fifth Circuit ruled in *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172, certiorari denied, 379 U.S. 990, a parallel injunctive suit brought against FEC by a union representing operating employees, that FEC had violated the Railway Labor Act by its wholesale abrogation of the existing collective bargaining agreements without compliance with the statutory procedures. This decision is reproduced in Appendix C, *infra,* pp. 26a–44a. The court of appeals also ruled, however, that FEC, without compliance with the Act, could institute such departures as the district court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (App. C, *infra,* p. 43a; 336 F. 2d at 182). The Trainmen filed a petition for a writ of certiorari, attacking, among other holdings, the ruling that FEC could make "reasonably necessary" departures from its agreements. However, at the time the petition was filed, no such departures had been applied for by FEC or granted by the district

court, and this Court denied certiorari. 379 U.S. 990.[5]

Pursuant to the Fifth Circuit's decision in the *Trainmen*'s case, the district court subsequently entered blanket injunctions in both that case and this case (App. B, *infra,* pp. 20a–22a) requiring FEC to abide by rates of pay, rules and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedures. On November 12, 1964, FEC filed in this case an application in the district court pursuant to the *Trainmen*'s decision for the approval of certain departures from its existing agreements with its non-operating unions which it contended were "reasonably necessary" to operate the trains. On December 3, 1964, the court granted some of the requests and denied others (App. B, *infra,* pp. 23a–25a). Specifically, FEC was permitted to exceed the ratio of apprentices to journeymen set forth in the agreements, to contract out certain work, and to use supervisory personnel to perform certain jobs for which FEC had shown that properly trained personnel were unavailable.

Both sides appealed. FEC took the position, which had been rejected by the court of appeals in the *Trainmen*'s decision, 336 F. 2d at 180, that its agree-

[5] FEC opposed the Trainmen's petition, arguing with respect to the issue of the correctness of the "reasonably necessary" rule that "the attempt to secure review of this feature of the Court of Appeals holding raises at best an hypothetical question on which at the present time there is no record at all upon which this Court could make any determination." Brief in Opposition, *Brotherhood of Railroad Trainmen* v. *Florida East Coast Railway Co.* (No. 691, Oct. Term, 1964), p. 12.

ments were totally "suspended" for the duration of the strike, and that it could operate under any work rules it desired during the strike. The United States contended, on the other hand, that the Act flatly forbids a railroad from unilaterally implementing any changes in rates of pay, rules or working conditions without negotiation, and that the district court had therefore erred in permitting any variations from the agreement. Relying upon the *Trainmen*'s case, the court of appeals affirmed. In the court's view, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate" (App. A, *infra,* pp. 7a–8a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case—permitting a railroad carrier unilaterally to depart from existing rates of pay, rules, or working conditions where "reasonably necessary" to offset the impact of a lawful strike—is contrary to the unambiguous and unqualified language of the Railway Labor Act. The exception to the Act thus judicially created for the first time, permits carriers to circumvent the carefully specified procedures for negotiation and mediation which the Act prescribes as the primary means for settling labor disputes in the railway industry. In our view, there is no basis in law or policy for the exception thus created; we believe, moreover, that this exception constitutes a potentially

serious disruptive element in railway labor relationships with effects well beyond the particular labor dispute here involved. This latter consideration is especially pertinent with regard to the sensitive and pervasive work-rules disputes presently troubling the industry. In order to remove this source of potential labor conflict, and to reaffirm that the Railway Labor Act indeed means what it states in terms—that no unilateral changes in existing rates of pay, rules, or working conditions may be made without prior recourse to the negotiation and mediation procedures of the Act—it is important for the Court to review the decision below in this case and thus to settle this basic issue in the administration of the Railway Labor Act.[6]

1. The Railway Labor Act specifies the procedures to be used by a carrier covered by the Act in implementing changes in existing rates of pay, rules, or working conditions of its employees covered by collective bargaining agreements. Specifically, Section 2, Seventh, of the Act flatly prohibits unilateral changes of this nature on the carrier's part by providing:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in

[6] A petition for a writ of certiorari has already been filed to review the judgment of the court of appeals in this case by the non-operating unions, who were intervenors in the district court and appellees in the court of appeals. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, et al.* v. *Florida East Coast Railway Co.*, No. 750, Oct. Term, 1965.

> agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 6 of the Act (45 U.S.C. 156), entitled "Procedure in changing rates of pay, rules, and working conditions," provides that the party desiring a change in conditions "shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions."[7] Within this 30-day period preceding the change a conference must be agreed upon between the parties to the dispute (*ibid.*).

The Act thus requires face-to-face negotiation prior to the implementation of any change in existing conditions of employment. If this negotiation is unsuccessful in reaching agreement prior to the implementation of the change, the Act further provides that either party to the dispute may request the services of the National Mediation Board (as the unions did here) or that the Board may proffer its services on its own initiative; and that, in either event, the "Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement" (Section 5, First, 45 U.S.C. 155, First).

[7] The uniform understanding of Section 6 seems to be that it is applicable to all changes in existing conditions which were set through collective bargaining, even though the collective-bargaining agreement embodying those conditions may formally have terminated. The issue, in any event, ordinarily does not arise, for collective bargaining agreements in Railway Labor Act industries—including the agreement in this case—do not generally terminate on a fixed date, but continue either until a new agreement is reached or until the negotiation and mediation processes prescribed by the Act have broken down.

"If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavour * * * to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter" (*ibid.*). During this entire period in which the proposed change is subject to negotiation, mediation or arbitration, it is expressly provided that "rates of pay, rules, or working conditions shall not be altered by the carrier" (Section 6; Section 5, First). Should mediation fail, Section 10 of the Act (45 U.S.C. 160) further provides for the creation of a Presidential board of review to consider the dispute in cases of sufficient importance and, while such a board is in existence, the Act again explicitly provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (*ibid.*).

Thus, the Act carefully provides, through a series of detailed provisions, for negotiation, mediation and arbitration before a carrier may make unilateral changes in existing rates of pay, rules and working conditions. Before these statutory procedures are invoked, and while the possibility remains that the dispute will be amicably settled through the use of any one of them, the Act explicitly forbids unilateral action by the carrier in the matters as to which change is sought. Such changes may be made only after the statutory procedures fail to bring about a negotiated solution to the particular controversy. Orderly negotiation—rather than unilateral implementation of

changes—is integral to the scheme of the Act and its fundamental purpose "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions" (45 U.S.C. 151a (4)). See *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711, 725.

Despite these unambiguous statutory provisions, and although it recognized in the *Trainmen*'s case (App. C, *infra,* p. 35a) that the FEC here, "with no pretense at compliance with the Act," "has unilaterally instituted wholesale changes" relating to rates of pay, hours, and working conditions some of which it "seeks to establish permanently," the court of appeals nevertheless, and for the first time, created an exception to the Act permitting unilateral changes in existing conditions without resort to negotiation or access to mediation. Specifically, the court held that where lawful strike conditions exist a carrier is free unilaterally to implement changes in its existing employment conditions which "may be reasonably necessary in light of the strike conditions" (App. C, *infra,* p. 42a).

Neither the words nor the purposes of the Act suggest such a "strike conditions" exception, and no intimations in that regard can be found in the legislative history.[8] Nor is the reason given by the court

[8] In all the proceedings arising from this strike, FEC has been unable to point to any legislative history even remotely suggesting that Congress intended any relaxation of the prohibition against unilateral changes in agreements. We are also unaware of any such expression of Congressional intention. The legislative history is silent on the exact question presented

of appeals to support its exception persuasive—that where a union has resorted to self-help through a strike a carrier ought to have a similar right (See App. A, *infra*, pp. 7a–8a). It is true that FEC here has been subjected to a strike over a wage dispute. That dispute, however, was made the subject of statutory negotiation and mediation and the unions involved therein did not invoke self-help and institute a strike until after the statutory procedures, including a Presidential fact finding board appointed under Section 10 of the Act, had been exhausted. The strike of which FEC complains, therefore, is entirely lawful and is in no way a circumvention of the negotiation and mediation provisions of the Act; it was instituted only after negotiation had failed and self-help became the only remaining remedy. Under the court of appeals' decision, however, FEC may rely upon that strike to by-pass the statutory procedures with respect to separate issues which have never been the subject of statutory negotiation or mediation.

The court of appeals held that it should create a "strike" exception to the unequivocal language of Section 2, Seventh, because such an exception was necessary to effectuate the carrier's right to self-help—*i.e.*, its ability to operate, or to try to operate, during a strike (App. A, *infra*, pp. 7a–8a). We note, however,

---

here, very likely because it was assumed (a) that after the passage of the Act strikes and lockouts in the railroad industry would "cease," see S. Rep. 304, 66th Cong., 1st Sess., p. 22 (1919); 67 Cong. Rec. 4582 (1926), or (b) that any strike would be accompanied by a total cessation of service.

that FEC is the only railroad carrier to attempt to operate during a strike in the last five years.[9] In any event, in the face of the clear language and purpose of the Act, the court of appeals was in error in creating an exception to statutory requirements in order to prevent what it believed to be an imbalance of power between unions and employers. Cf. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316.[10]

2. We thus urge that the decision of the court of appeals—permitting unilateral changes by the carrier of rate of pay, rules, and working conditions as a counter to lawful strike activity—is erroneous in that it conflicts with the clear terms and policy of the Railway Labor Act. In addition, it creates an exception of uncertain content and application to the orderly negotiation and mediation procedures of the Act. Unless the decision below is reversed, the existence of such an exception, we believe, is bound to constitute a seriously disruptive element in railway labor relationships.

Throughout the history of the Railway Labor Act a judicial exception to the Act's mediation procedures for "strike conditions" has never been thought nec-

[9] All other means of self-help available to an employer remained available to these carriers, as well as to FEC. One means of self-help available to railroads of considerable potential effectiveness would be an industry-wide strike insurance plan. See *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830.

[10] Carriers, of course, are free to institute those changes in agreements as to which the statutory procedure for notice and mediation has been followed.

essary before this dispute. FEC has shown no reason now, for the first time, to find inherent in the Act the power to circumvent orderly procedures which the court of appeals has accorded to strike-affected carriers.

This exception to the Act's procedures during strike conditions also will have an inevitably unsettling effect upon the ultimate resolution of labor disputes in the railway industry. In the first place, having unilaterally made changes "reasonably necessary" to continue operation during a strike—changes permitting more economical operation with fewer employees and less strict work rules—a carrier may well have little incentive to attempt to reach a settlement of the dispute which led to the strike, and indeed, may have strong reason to prolong it. Thus, under the court of appeals' decision, a strike may result in a beneficial windfall to the carrier, permitting it to operate its most profitable services under rules much less favorable to its employees than the rules arrived at through the collective bargaining process.[11] In certain circum-

[11] Thus, under the rule announced in the court of appeals, Federal district courts may well be in the position, not merely of effectuating a carrier's right to attempt to operate, but also of rendering a strike ineffectual. Federal judges should not, however, thus make changes in the balance of power between union and employer by granting *ad hoc* relief to one or another of the adversaries. Compare *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316. The area into which the decision below would have the district courts intrude is one of "delicate and contemporaneous issues of policy" where "economic sympathies and prepossessions [of individual district judges] may unwittingly foreclose the solution of these issues." Frankfurter and Greene, *The Labor Injunction* (1930) p. 132.

stances, moreover, railroads might even find it advantageous to precipitate strikes over one issue in order to circumvent the process of negotiation and mediation required for the making of changes in work rules or working conditions otherwise required by the Act. At the very least, the "reasonably necessary" rule would, when invoked, broaden the area of dispute between the parties since the changes in pay, work rules and conditions unilaterally effectuated through the doctrine will surely constitute new issues between the parties in addition to those which originally led to the strike. All of these dangers are illustrated in this case, where FEC's unilateral changes have superimposed a work-rules disputes onto an existing wage dispute and have, without question, decreased the likelihood of a reasonably prompt settlement of the underlying strike.

Such an exception to the Act, moreover, while formally limited to permitting unilateral changes only *during* a strike, would inevitably have adverse effects upon the mediation of proposed permanent changes desired by the carrier. In this case, for example, the district court has authorized FEC to make "temporary" changes which are also encompassed in Section 6 notices proposing permanently to substitute the "Uniform Work Agreement" for its present agreements.[12] Mediation over the proposed permanent

[12] For example, in permitting FEC to depart from the ratio of apprentices to journeymen and from age limitations set forth in existing agreements, the district court has allowed FEC to put into effect a portion of the Uniform Working Agreement (Exh. Vol. 38–74) which imposes no such limitations upon FEC, and instead contains sweeping management prerogatives clauses leaving such matters entirely up to FEC (Exh. Vol. 38–40).

changes by the National Mediation Board is thus jeopardized because the parties are placed in the position of discussing "proposed" changes some of which already are in effect. The entire emphasis of the Railway Labor Act, however, is upon bargaining over *proposed* changes in the agreements, with implementation of such changes prior to termination of mediation explicitly prohibited. See, *e.g., Manning* v. *American Airlines,* 329 F. 2d 32, 35 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.,* 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864. A carrier with actual benefits of proposed changes in hand, or with an awareness of the possibility of effectuating them at any time, without mediation, is less likely to engage in meaningful bargaining as contemplated by the Act.[13]

3. In sum, the court of appeals new exception to the clear requirements of the Railway Labor Act may well encourage carriers to precipitate or prolong strikes in the railway industry as a means of unilaterally implementing desired work-rules changes without preceeding negotiation or mediation.[14] It will, in

[13] As the court of appeals itself recognized in the *Trainmen*'s case, the processes of bargaining and mediation called for by the Act, and carried on with the assistance of Federal mediators, are "a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice." *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen, supra,* 336 F. 2d at 180.

[14] The success of FEC's illegal actions during this strike has not been unnoticed, and surely must tempt other railroad management. As stated in a trade journal:

> Chapter or footnote, there seems little doubt that the FEC strike will haunt railway labor for years. Less clear

any event, disrupt the mediation process as it pertains to proposed permanent work-rules changes by providing a potential means for immediate implementation of such changes without engaging in good-faith bargaining and without waiting for the termination of the mediation process. It is important, in our view, for this Court to reject a principle, wholly unsupported by the Act and never before thought to be a necessary ingredient in railway-labor relationships, which threatens to subvert the statutory mediation procedures and which is thus likely to be productive of increased acrimony and failure to bargain in the railway industry.[15]

---

is the effect the strike will have on railway management. Railroad managers will ponder for a long time the fact that FEC survived without its union people—and got back into full freight operation with less than half the men formerly required to handle the work.

Railway Age, *The FEC Story: Survival without Unions?* (July 27, 1964), pp. 34–35.

[15] Although no conflict exists among court of appeals decisions upon the exception to the Railway Labor Act created by the court of appeals in this case, the issue will almost certainly recur in the lower federal courts as a result of the decision below and it is unlikely that this Court will have another opportunity to resolve it in the foreseeable future. The vitality of the issue depends upon the continuance of a strike, and the present FEC strike is of unusually great length. Thus, if the decision below is not reversed, its principle might well be used in the future to circumvent the Railway Labor Act and bypass the negotiation and mediation required by statute, without the issue ever being presented for appellate judicial consideration. The issue presented here probably will not arise in a damage suit, even assuming that such a suit will lie for violation of the Railway Labor Act, since a district court's order permitting "reasonably necessary" changes would likely be a defense to such an action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

PAUL BENDER,
Assistant to the Solicitor General.

DAVID L. ROSE,
WALTER H. FLEISCHER,
Attorneys.

NOVEMBER 1965.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 22134

FLORIDA EAST COAST RAILWAY COMPANY,
APPELLANT-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE-APPELLANT
(AND REVERSE TITLE)

Appeals from the United States District Court for the Middle District of Florida

(July 21, 1965)

Before TUTTLE, Chief Judge, EDGERTON,[1] and SMITH,[2] Circuit Judges

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal by the Railway from a preliminary injunction

[1] Senior Circuit Judge of the D.C. Circuit, sitting by designation.

[2] Of the Third Circuit, sitting by designation.

entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company* v. *Brotherhood of Railway Trainmen*, 5th Cir., 336 F. 2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 non-operating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F. 2d 172, 182, which we here quote:

> "* * * The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District

> Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the § 6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the "conditions of employment" of September 1, 1963 and from

> "making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment

practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

(1) The use of existing personnel to do work across craft lines and seniority districts;

(2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

(3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without

discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was permitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain

the suit. This distinguishes the case, the Railway says, from *Re Debs,* 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop. The Railway further contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra.* See also *United States* v. *City of Jackson, Mississippi,* 5th Cir. 318 F. 2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate com-

merce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of proceeding by the United States. This provision is as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, * * *. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *."

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra,* and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions, nevertheless contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F. 2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor,

it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the existing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court * * *." The Railway contended that it should be permitted to institute the deviations and leave it to the United States or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is,

as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, Townsend v. Sain, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L. Ed. 2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are clearly erroneous as are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is AFFIRMED. On the cross-appeal of the United States, the judgment is AFFIRMED.

APPENDIX B

Filed October 30, 1964

Findings of Fact and Conclusions of Law

This cause having been heard by the Court on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of Defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following Fndings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does business within the Middle Judicial District of Florida,
332 and has its principal place of business in St. Augustine, Florida.

2. Collective bargaining agreements between Defendant and the labor organizations listed in footnotes 1, 2 and 3, *infra,* have been in effect for many years governing rates of pay, rules and working

conditions of certain crafts or classes of Defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

3. Since January 23, 1963, the 11 labor organizations listed in footnote 1,[1] representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September 1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing levels,
333 with certain periodic increases; for the establishment of a flat $1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions of reduction of forces. This September 18, 1961, notice constitutes the outer

[1] Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

793-774—65——3

limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

4. The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief period after the strike began the railroad was completely shut down. On February 3, 1963, the Defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

5. These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

6. On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which
334 the replacements were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment", as they were called.

7. By August, 1963, the Defendant was performing 90.06% of the carload freight service performed in a

comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

8. By October 1, 1963, the Defendant was operating at this near-capacity level with about 650 employees, as opposed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

9. On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,[2] in which
335 it proposed a new "Uniform Working Agreement", substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and

[2] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employees Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

working conditions contained in the governing collective bargaining agreements with the 17 organizations.

10. After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

11. One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963.

On January 6, 1964, the Board docketed the
336 dispute as Case No. A-7093.

12. Cases No. A-7055 and A-7093 are still pending before the National Mediation Board.

13. Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

14. By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

15. Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the Defendant FEC has stated it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

16. Although since August, 1963, the Defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-than-carload freight or passenger
337 service, its employment has leveled off, apart from replacement of normal turnover, at approximately 850 employees; it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has not been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the Defendant FEC to expand its present manpower requirements.

17. On July 31, 1963, FEC served notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,[3] in which it proposed to cancel and

---

[3] American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical

abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

18. After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation
338 Board were requested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A–7027. The matter is still pending before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A–7022. This matter is also still pending before the Mediation Board.

19. Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

20. As to all non-operating crafts and classes on the FEC property which are represented by the organi-

---

Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

zations set forth in footnotes 1, 2 and 3, *supra,* the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same). These
339 presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs,* 158 U.S. 564, 584, 586 (1895).

(3) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1963, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 722–724 (1945); *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL–CIO* (C.A. 5, No. 21356, August 18, 1964), —— F. 2d ——.

(4) The labor organizations listed in footnotes 2 and 3, *supra*, made a timely and proper invocation of the services of the National Mediation Board as
340 to both the notice of July 31, 1963, and the notice of September 24, 1963.

(5) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen, AFL–CIO, supra.*

(6) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment", for which each individual employee was made to sign a receipt agreeing to waive his rights under the existing collective bargaining argeement as to his craft or class and agreeing to accept instead said "Conditions of Employment", violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(7) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on term as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in
341 force for the relevant crafts or classes of em-

ployees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(8) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(9) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(10) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the Defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item
342 basis for review and determination hereafter.

(11) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and employees of Defendant FEC under the Railway

Labor Act for which there is no adequate remedy at law.

(12) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further Order of this Court. Since said preliminary injunction will issue upon the application of the United States, no requirement need be made for security. (See Rule 65, F.R. Civ. P.)

BRYAN SIMPSON
Chief Judge,
U.S. District Court

Jacksonville, Florida
October 30, 1964.

---

343 Filed Oct. 30, 1964

PRELIMINARY INJUNCTION

This matter coming on to be heard on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of Defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED AND DECREED:

1. That the Defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined and restrained, until further Order of this Court, from:

(a) in any manner continuing in effect or implementing in any respect the change in rates of pay, rules or working conditions announced in
344 FEC's notices of September 24, 1963, and July 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC
345 to this Court during the pendency of the current strike.

2. The Defendant Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further Order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the change in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefor by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

3. In order to permit the Defendant to make necessary changes and adjustments in its operations, the injunctive provisions of numbered Paragraphs 1 and 2 hereof shall become effective fourteen (14) days after the entry thereof.

DONE AND ORDERED at Jacksonville, Florida,
346 this 30th day of October, 1964.

BRYAN SIMPSON
Chief Judge, U.S. District Court

* * * * *

384 Filed Dec. 3, 1964

ORDER

This cause having come on for further hearing on the Application of Defendant for Approval of Employment Practices pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964; and the Court having received testimony and other evidence in open court and heard argument of counsel, the Court finds that in order to enable the Defendant to effectuate its right of self help during the strike which has been in progress since January 23, 1963, certain departure from the collective bargaining agreements presently in force on Defendant's property, as hereinafter set forth, are reasonably necessary; and further finds that there is no showing of reasonable necessity for departure from said collective bargaining agreements in any other respect; and it is, therefore,

ORDERED:

1. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority
385 district restrictions, is denied.

2. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by requiring or permitting supervisors to perform craft work, is denied, except that until March 31, 1965, Defendant may man the positions of one Train Dispatcher and two Rate and Division Clerks with supervisory personnel, and that Defendant may thereafter continue this practice only upon a showing of reasonable necessity.

3. Defendant's request that it shall not be deemed in violation of any existing collective bargaining

agreement by exceeding the apprentice and/or trainee ratios or maximum age limitations contained in any such agreement, is granted.

4. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by permitting or requiring non-exempt foremen to perform scope work of the craft they supervise, is denied.

5. Defendant's request that it shall not be deemed in violation of any existing agreement, by virtue of the contracting out of work which it does not have personnel available to perform, is denied except that it may continue to contract out work in areas where it is presently doing so, as shown in this record, to-wit: the performance of the work of one Bridge Maintenance and Repair Gang and installation and maintenance of the Centralized Traffic Control System.

6. Defendant's request to perform the work
386 of Bridge Tender by supervisory or contract employees during the continuance of the strike, is denied except that Defendant may continue to use supervisory or contract employees in the position of Bridge Tender until March 31, 1965.

7. Defendant's request that its obligation to furnish seniority rosters be conditioned upon an Order subjecting the General Chairman, or other designated official requesting such lists, to sanctions for contempt in the event of their misuse, is denied.

8. Defendant's request that the union shop provisions of each collective bargaining agreement be declared void and unenforceable as to new employees hired since January 23, 1963, is denied; and it is

FURTHER ORDERED that Defendant shall have to and including December 10, 1964, in which to bring itself into full compliance with this Court's Preliminary Injunction of October 30, 1964, and this Order.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of December, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 21356

FLORIDA EAST COAST RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AFL–CIO, APPELLEE

Appeal from the United States District Court for the Middle District of Florida

(August 18, 1964)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge

BROWN, Circuit Judge: Florida East Coast appeals from the grant of a preliminary injunction[1] which restrains it from operating under working conditions different from those contained in its agreement with the Brotherhood of Railroad Trainmen, the bargain-

[1] The injunction was stayed by this Court on March 17, 1964, after argument of counsel and exchange of briefs.

ing representative of FEC's employees in the crafts of trainmen and yardmen.[2] The primary question presented is to what extent, if at all, is a Carrier faced with strike conditions free to institute changes affecting rates of pay, rules, or working conditions without complying with the procedures provided in § 6 of the Railway Labor Act?[3]

The unusual importance of the facts giving rise to this controversy requires that we state them in some detail.

THE NOVEMBER 2, 1959 NOTICE

On November 2, 1959, FEC, along with the other 200-odd Class I Carriers in the United States, issued two notices pursuant to § 6 to its operating organizations, including BRT. One related to "Consist of Crews," the other, to "Basis of Pay and Assignment of Employees." Conferences between individual carriers and the operating organizations failed to produce agreement, and negotiations on a national level were begun.[4] The national negotiations of the November 2, 1959 notice likewise did not produce agreement, and in October of 1960, the Organizations[5] and the Carriers agreed to the creation of a Presidential Railroad Commission which was to investigate and

[2] These are so-called "operating crafts"; that is, the crafts of employees whose work involves the actual operations of the trains.

[3] 45 USCA § 156.

[4] The FEC executed a power of attorney to the Southeastern Carriers Conference Committee for the purposes of representation in the joint national negotiations.

[5] In addition to the BRT, the labor organizations representing operating crafts which were engaged in the national negotiations were Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, and Switchmen's Union of North America.

793-774—65——4

report on the controversy, using its "best efforts, by mediation, to bring about an amicable settlement * * *."[6] On February, 28, 1962, the report of the Commission[7] was delivered to the President. National conferences on the remaining unsettled issues resumed on April 2, 1962, and continued through May 17. These conferences did not result in agreement, and on May 21 the Organizations applied for the mediation services of the National Mediation Board pursuant to § 5 of the Act. After numerous meetings[8] had been held under the auspices of the Board without agreement being reached, the Board on July 16, 1962, terminated its services.[9] The Carriers then served notice that they intended to put the November 2, 1959, notice into effect,[10] and the Organizations and Carriers began the litigation which was to culminate in the Supreme Court holding that the stat-

[6] *Brotherhood of Loc. Eng.* v. *B. & O. R.R.*, 1963, 372 U.S. 284, 286, 83 S. Ct. 691, 9 L. Ed. 2d 759. This case contains much background information regarding the national handling of the November 2, 1959 notice, and has been freely relied upon to place the events of record in proper context.

[7] The Commission was created by Executive Order 10891 in November 1960, and its members were appointed in December of that year. The parties had agreed that the proceedings of the Commission were to be accepted "as in lieu of the mediation and emergency board procedures provided by * * *" §§ 5 and 10 of the Act.

[8] Between May 25 and June 22, approximately 32 meetings were held.

[9] The Organizations refused to submit the dispute to arbitration.

[10] The first notice was actually issued on July 17. The Organizations filed suit alleging that the rule changes encompassed by the July 17 notice of intent would violate the Act. Subsequently, with leave of Court and without objection by the Organizations, the Carriers withdrew the July 17 notice and substituted therefor the November 2, 1959 notices, the changes to become effective on August 16.

utory procedures having been exhausted, the November 2, 1959, notices could be put in effect subject only to the invocation of a § 10 Emergency Board. *Brotherhood of Loc. Eng.* v. *B. & O. R.R.*, 1963, 372 U.S. 284, 83 S. Ct. 691, 9 L. Ed. 2d 759.

While the *B. & O.* case was making its tortuous way to the Supreme Court, things were happening back at the FEC yard. On January 23, 1963, 11 cooperating, non-operating labor organizations [11] representing certain FEC employees went out on strike over a wage demand as to which all parties concede the procedures of § 6 had been exhausted. The BRT did not issue a strike notice, but its members honored the picket lines of the non-operating organizations and consequently did not report for work. Eleven days later, on February 3, 1963, FEC resumed operations by utilizing supervisory personnel and some replacement workers. It is uncontradicted on this record that replacements utilized in the trainmen and yardmen crafts were worked under conditions which differed from those provided by the collective bargaining agreement then in effect betwen FEC and the BRT.[12]

Then on March 4, 1963, the *B. & O.* decision came

[11] The organizations are International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers International Association; International Brotherhood of Electrical Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Firemen and Oilers; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Maintenance of Way Employees; The Order of Railroad Telegraphers; Brotherhood of Railroad Signalmen; and Hotel and Restaurant Employees and Bartenders.

[12] The exact terms of employment of the replacement workers need not here be detailed. It suffices to say here that the conditions under which they worked from February 3, 1963, also differed from the conditions as set out in the No-

down, and on March 12, 1963, the FEC withdrew authority from the Southeastern Carriers Conference Committee to negotiate for it the November 2, 1959, notice. The formal mandate of the Supreme Court in the *B. & O.* case was received in the District Court in Illinois on April 2, 1963, and on that day the National Railway Labor Conference sent a telegram to the National Mediation Board advising that the District Court upon receipt of the mandate had dissolved the injunction straining the Carriers from making the November 2, 1959, changes effective, and that the Carriers proposed to make them effective on April 8. On the same day, April 2, FEC advised its operating Organizations including BRT that it proposed to make the November 2, 1959, notices effective on April 3. Likewise on April 2, the Mediation Board certified by letter to the President the existence of an emergency and recommended the appointment of an Emergency Board under § 10. On April 3, Emergency Board No. 154 was created.

Meanwhile, apparently on receipt of FEC's April 2 letter, the BRT issued a strike notice effective April 5. This occasioned no change in FEC's operations since FEC had been struck by the non-operating crafts since January 23, 1963, and during all this time the BRT had honored the picket lines. However, the United States was convinced that FEC could not place the notice into effect until the Emergency Board had finished its investigation of the dispute and the 30-day waiting period provided in § 10 had expired.[13] The United States was successful on May 7, 1963, in

---

vember 2, 1959, notice but were substantially identical to those formally reduced to writing on September 1, 1963, which are discussed *infra*.

[13] This would put the FEC on a par with the other Carriers which participated in the national handling of the dispute.

obtaining an injunction to that effect. *United States* v. *Florida East Coast Ry.*, D.D.C., 1963, 221 F. Supp. 325.[14] Emergency Board No. 154 reported on May 13, 1963, and the 30-day waiting period subsequently expired. The FEC and the other Carriers were then free for the first time to put the November 2, 1959, notices into effect.

That is precisely what FEC did. On July 8, 1963, it issued a formal notice to the operating Organizations, including BRT, that on July 10, 1963, the November 2, 1959 notices would be put into effect. The BRT again issued a formal strike notice,[15] but—as in April—this did not change the operating situation since the BRT was still refusing to cross the picket lines of the nonoperating crafts who were still out on strike. Consequently, the November 2, 1959, notice was formally [16] in effect as of July 10, 1963.

Then on August 23, 1963, Congress passed Public Law 88-108,[17] which among other things prohibited Carriers which had served the November 2, 1959, notice from unilaterally making changes in "rates of pay, rules, or working conditions encompassed by * * * such" notice and ordered that action of the sort

---

[14] The injunction was conditioned upon FEC's being allowed to participate fully in the proceedings before the Emergency Board.

[15] The BRT had voluntarily withdrawn the April strike notice upon the issuance of the injunction in *United States* v. *Florida East Coast Ry.*, D.D.C., 1963, 221 F. Supp. 325.

[16] The word "formally" is used repeatedly for one simple reason. The FEC has never operated under the November 2, 1959, rules. At all times pertinent to this suit subsequent to January 23, 1963, the FEC has operated under conditions which differ from both the collective bargaining agreement as it existed prior to November 2, 1959, and the agreement as it would be constituted after amendment by the November 2, 1959 notice.

[17] Act of August 23, 1963, 77 Stat. 129.

prohibited which had already been taken be rescinded, and "the status existing" immediately prior to such action restored." It further provided that two of the issues encompassed by the November 2, 1959 notice were submitted to binding arbitration [18] and set up the procedure for accomplishing that arbitration. In response to the request of Secretary of Labor Wirtz, the FEC withdrew November 2, 1959, rules which it had formally put into effect on July 10, for the life of Public Law 88–108. When 88–108 expired by its own terms on February 24, 1964, four days before the hearing in the District Court which resulted in the March 2, 1964, preliminary injunction appealed from, the FEC again placed the November 2, 1959, notice formally into effect.[19] This brings us to date with respect to the November 2, 1959, notice. But meanwhile, other things were happening.

The Union Shop Notice

On July 31, 1963, the FEC issued a new § 6 notice to the BRT that it proposed to cancel the union shop provision of the collective bargaining agreement. Representatives of the FEC and BRT assembled at the Monson Hotel in St. Augustine, Florida, on August 29, 1963, but the conference never began. The

[18] The portions submitted to binding arbitration were those identified as "use of Firemen (Helpers) on Other Than Steam Power," "Consist of Road and Yard Crews," and certain portions of the Organizations' September 7, 1960, notice relating to the same subject matter. These matters have been settled by agreement of the FEC and its operating Organizations and are not here involved.

[19] The notice letter to BRT of February 24, 1964, stated that the 1959 notice would be placed into effect at 12:01 a.m., Tuesday, February 25, 1964. As indicated previously, other settlement had been made of the "Firemen" and "Crew Consist" issues (see note 18, *supra*), and these portions of the November 2, 1959, notice were excepted from the terms of the letter.

FEC insisted on having a Court Reporter present to record the meeting, and the BRT refused to negotiate under such circumstances. Consequently, on September 4, the BRT requested the services of the National Mediation Board. The Board accepted the case, and it was docketed the same day as NMB A–7026. On September 9, the FEC received a letter from the National Mediation Board informing that the matter had been docketed. However, earlier that same day (September 9, 1963), the FEC had written the BRT to say that the conference having been ineffectual and the services of the Mediation Board not having (to its knowledge) been invoked, it was putting the July 31, 1963, notice abolishing the Union Shop into effect. The Union Shop portion of the collective bargaining agreement has not been honored since that date although the matter still pends before the Mediation Board.

THE SEPTEMBER 25, 1963 NOTICE

As we indicated in the preceding statement, the FEC has operated since February 3, 1963, under conditions of employment that differ from both the pre-1959 collective bargaining agreement and the agreement as it would be amended by the November 2, 1959, notice. Those actual operating conditions were formally reduced to writing on September 1, 1963, and all employees hired to work in the trainmen and yardmen crafts since that date have been required to sign a copy of this formal promulgation called by FEC "Conditions of Employment." Then on September 25, 1963, the FEC served a § 6 notice which proposes to amend the collective bargaining agreement to provide rates of pay, rules, and working conditions which all concede are substantially identical to those embodied formally in the "Conditions of Employment" and followed in actual practice since Feb-

ruary 3, 1963. On October 30, 1963, the FEC resumed conferences on the November 2, 1959, and the September 25, 1963, notices, discussing the November 2, 1959, notice first. On November 1, 1963, the discussion of the September 25, 1963, notice continued. The parties were still discussing this notice on February 28, 1964, the date of the hearing on BRT's motion for preliminary injunction.

The position of the BRT and the United States as *amicus curiae,* simply stated, is that the FEC has instituted changes in rates of pay, rules, and working conditions without following procedures made mandatory by the Act. They further urge that the injunction was necessary in order to prevent a subversion of the statutory procedures.

The FEC, on the other hand, contends that the complaint of the BRT is that the bargaining agreement is not being complied with. Such complaints, it urges, are "minor disputes" within the exclusive jurisdiction of the Railroad Adjustment Board. It further asserts that whatever the nature of the dispute, major or minor, it is justified by "strike conditions" in operating under the working conditions it has imposed. This is true, it says, despite the fact that the conditions are different from both the pre-1959 agreement and the agreement as it would be constituted after amendment by the November 2, 1959, notice. And, the argument continues, this is so even though the working conditions are substantially identical with the proposal of September 25, 1963, which is presently being discussed by it and the BRT because these are "temporary conditions imposed by strike" and not permanent prospective changes of the "agreement."

First, we think that this is clearly a so-called "major dispute" within the meaning of the decisions

of the Supreme Court and this Court. *Elgin, Joliet & Eastern Ry.* v. *Burley,* 1945, 325 U.S. 711, 723–25, 65 S. Ct. 1282, 89 L. Ed. 1886; *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.,* 1960, 362 U.S. 330, 341, 80 S. Ct. 761, 4 L. Ed. 2d 774; *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Locomotive Engineers,* 5 Cir., 1955, 266 F. 2d 335; *St. Louis, San Francisco & T. Ry.* v. *Railroad Yardmasters of America,* 5 Cir., 1964, 328 F. 2d 749; *Aaxico Airlines, Inc.* v. *Air Lines Pilots Ass'n International,* 5 Cir., 1964, 331 F. 2d 433. This is not a case like *Missouri-Kansas-Texas, Frisco, or Aaxico* involving a dispute as to whether the agreement authorizes action taken by the Carrier. Neither is it a case involving a dispute over the meaning of the terms relating to rates of pay, hours, and working conditions. Rather, this is a case in which a Carrier has unilaterally instituted wholesale changes in these terms, changes which, in the negotiations presently going on with respect to the September 25 notice, it seeks to establish permanently. The bulk of the changes were instituted on February 3, 1963, with no pretense at compliance with the Act. Although FEC did serve the July 31, 1963, notice of intent to cancel the Union Shop agreement, the cancellation was formally effected on Septemper 9, 1963, while the matter was pending before the National Mediation Board.[20] Employees hired after September 1, 1963, were made to sign the "Conditions of Employment" which formally reduced to writing the changes of February 3, 1963. Again, this was done with no pretense of compliance with the Act. Finally on September 25, 1963, the FEC served

[20] There is no merit to the contention of the FEC that the services of the Mediation Board were not properly invoked because FEC did not receive notice of the invocation within ten days. The Act merely requires that the services be invoked within ten days, as was done here.

a § 6 notice with respect to those changes. Whether the strike conditions do justify the changes in whole or in part is admittedly a difficult question, but neither the presence of the question nor its difficulty changes the character of the dispute from "major" to "minor." [21] In short, the controversy is not over what the bargaining contract now permits as a matter of contract construction. The dispute is over the steps FEC can take to extricate itself from the consequences of a strike or other refusal by BRT to supply manpower.

Second, it is equally clear that if this were the ordinary situation of a Carrier not faced with "strike conditions," [22] the institution of wholesale changes of the sort here involved would be enjoinable by the District Court pending exhaustion of the procedures of the Act. E.g., *Manning* v. *American Airlines*, 2 Cir., 1964, 329 F. 2d 32; *R.R. Yardmasters* v. *Pennsylvania R.R.*, 3 Cir., 1955, 224 F. 2d 226; *Railway Employees' Co-op* v. *Atlanta B. & C.R.R.*, D. Ga., 1938, 22 F. Supp. 510; *Chicago & W.I.R.R.* v. *Brotherhood of Ry. & S.S.*

[21] The fact that the Union Shop and 1949 agreements are still legally "existing" does not convert this into a "minor dispute." Agreements in the railroad industry do not cease to be effective until they are changed in accordance with the Railway Labor Act. As the United States observes, this emphasis on the "'existence of the agreements' is thus a non sequitur."

[22] We do not find it necessary to resolve the controversy waged both in the District Court and here as to whether the BRT was actually "on strike" from January 23, 1963, to the date of hearing in the District Court. Although the BRT was formally on strike for only two short periods during that time, it is uncontradicted that its members honored the picket lines of the non-operating Organizations and did not work and would not until the non-operating strike was terminated. For the purposes of this decision, whatever this might be called we hold that FEC was faced with "strike conditions" from the refusal of BRT to perform essential work.

Clerks, N.D. Ill., 1963, 221 F. Supp. 561; *Monon* v. *Brotherhood of R.R. Trainmen,* N.D. Ill., 1963, 215 F. Supp. 430.[23] The rationale of these decisions is a simple one. Under the structure of the Act, changes "in agreements affecting rates of pay, rules, or working conditions * * *" may be instituted unilaterally only after notice, negotiation and mediation (if requested) and action by the Presidential Emergency Board if convened under § 10. In order to insure that the purpose manifested in the Act to provide for orderly settlement of "all disputes" not be frustrated, the status quo must be preserved pending the exhaustion of the statutory procedures. Bargaining is a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice.

But that is precisely what FEC asserts it may do here. With formal negotiations in progress under the September 25, 1963, notice, the argument of FEC that the changes which all parties agree are substantially identical to those embodied in the notice are only temporary (for the duration of the strike) is plainly specious. Through the means of the "Conditions of Employment" which all must sign, it has in fact instituted rates of pay, rules and working conditions over which it is presently bargaining under the procedures

[23] We thus agree with the position of the United States as amicus curiae that the Norris LaGuardia Act, 29 USCA § 101, does not bar enforcement of the mandate of the Railway Labor Act. *Virginia Ry.* v. *System Federation,* 1937, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Graham* v. *Brotherhood of Firemen,* 1949, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22; compare *Textile Workers* v. *Lincoln Mills,* 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *Telegraphers* v. *Chicago & N.W. Ry.,* 1960, 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774. Today, as in 1930, the mandates of the Railway Labor Act are enforceable by injunctive decree. *Texas & N.O.R.R.* v. *Railway Clerks,* 1930, 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

of the Act. This it cannot do, and the fact that the changes in actual operations were instituted prior to the § 6 notice can make no difference. In both *Manning* v. *American Airlines,* 2 Cir., 1964, 329 F. 2d 32, and *Chicago & W.I.R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* N.D. Ill., 1963, 221 F. Supp. 561, injunctions were issued against changes which had already been instituted prior to suit.

The strike conditions, however, do have relevance to the proper solution of the problem at hand. Opposed both by the BRT and the United States, FEC urges that the collective bargaining agreement is wholly suspended during the strike and that any other holding will make it impossible to avail itself of its right to continue its business during the strike. It is clear that the suspension argument has no merit. The BRT is still the bargaining representative of all the employees in the crafts of trainmen and yardmen whether union members or not. *Steele* v. *L. & N.R.R.,* 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. *Telegraphers* v. *Ry. Express Agency,* 1944, 321 U.S. 342, 346, 64 S. Ct. 582, 88 L. Ed. 788.[24]

But the case does not turn on the question of sus-

[24] This case adopted for the Railway Labor Act the classic statement of the rule first announced in *J. I. Case Co.* v. *NLRB,* 1944, 321 U.S. 332, 336, 64 S. Ct. 576, 88 L. Ed. 762:

> "[H]owever engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits * * *."

pension. Rather, it is a problem of what the law permits when the protagonists have exhausted all of the elaborate governmental machinery for the settlement of a dispute, and neither is willing to budge. That is the situation here. There is an actual strike against FEC by the non-operating Unions. The continuation of the strike by such employees is legal. So, too, is the effort of FEC to operate. But as a result of this strike, BRT declines to supply the craft workers as its contract calls for. So far as FEC's need for these crafts and BRT's failure to supply them, there is no requirement, or provision, for this impasse being resolved under the machinery of the Railway Labor Act. Nothing in the Act forces either compulsory arbitration or acquiescence. At that juncture, what the Act recognizes is that each party is free lawfully to employ self-help. The Supreme Court in this very controversy made that plain. In its decision of March 4, 1963,[25] it stated:

> "* * * What is clear * * * is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute * * *."

See also, *Order of Railway Conductors* v. *L. & N. R.R.*, 1964, —— F. 2d —— [No. 20714, April 20, 1964].

Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration. Cf. *NLRB* v. *Radio & Television Broadcast Eng'rs, Local 1212*, 1961, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302. That the occasions for resort to this raw power will be rare under a system which hedges in disputes by elaborate negotiations, media-

[25] *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 1963, 372 U.S. 284, 291, 83 S. Ct. 691, 9 L. Ed. 2d 759.

tion and Presidential fact finding machinery does not deny either the existence of the power, or the present policy determination that, awesome as is its prospect, it is the only way to preserve the last vestige of free contracts, freely made.

Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R.R.*, 1957, 353 U.S. 30, 40, 77 S. Ct. 635, 1 L. Ed. 2d 622. Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.

To be sure, the law gives much power to organized labor. It discourages, on every hand, industrial and railroad labor strife, walkouts, lockouts, and strikes. But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate.

This policy is reflected, for example, under the National Labor Relations Act, by decisions such as *NLRB* v. *Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381; *NLRB* v. *Erie Resistor Corp.*, 1963, 373 U.S. 221, 83 S. Ct. 1139, 10 L. Ed. 2d 308; and *Redwing Carriers, Inc.*, 1962, 137 NLRB 1545, affirmed sub nom. *Teamsters, Local No. 79* v. *NLRB*, D.C. Cir., 1963, 325 F. 2d 1011. The consequences of self-help are not necessarily confined to the period of strife. Thus, as *Mackay Radio* and *Erie Resistor* clearly held, an employer may operate

his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. 221, at 232.

These principles are clearly applicable here. Indeed, the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement at least until union membership has been declined by him.

But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers. Some of the practices followed by FEC indicate the nature of the problem and this limitation on self-help. Thus, for example, it is uncontradicted on this record that in order to earn pay for eight hours work, employees must now be on duty for eight and one-half hours (30 minutes for lunch), whereas under the 1949 agreement, eight hours pay was earned by seven hours and 40 minutes work (20 minutes for lunch), or a total of eight hours on-duty time. Likewise, many jobs have been reclassified to six-day rather than five-day, thus avoiding payment of overtime, the practice apparently being to pay overtime only when an employee works a greater number of days than his job description calls for. The duties of switchmen and other yard employees have also been materially changed.

Although we do not here decide what changes may be reasonably necessary in light of the strike conditions, we hold that in a situation of this sort, it falls to the lot of the District Judge to pass on which changes are in fact necessary in order for FEC to continue to operate. Without placing it in terms of burden of proof and the like, we think it clear that in order for the District Judge to allow FEC to escape the ban on institution of changes pending exhaustion of the statutory procedures recognized by the decisions,[26] he must be convinced that in order to make a meaningful reality of FEC's right to continue to operate, the changes are reasonably necessary. While this appears to move the Judge from the firing line, *Townsend* v. *Sain*, 1963, 372 U.S. 293, 319, 83 S. Ct. 745, 9 L. Ed. 2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC has done or proposes to do.

Finally, one last matter must be disposed of. The District Court held that the notice of September 25, 1963, superseded the prior November 2, 1959, notice. We think there is nothing either in the timing or intrinsic content of the September 25 notice in relation to the November 1959 notice, or in *Brotherhood of Locomotive Fire & Eng.* v. *Southern Ry.*, D.D.C., 1963, 217 F. Supp. 58, urged forcefully by BRT and cited by the District Judge to support this view.[27] The parties bargained about each of the notices separately, though both were simultaneously pending for a period of time. Furthermore, it is apparent that the Car-

[26] See cases cited in text accompanying note 23, *supra*.

[27] The decision of the same Court in *United States* v. *Florida East Coast Ry.*, M.D. Fla., 1964 —— F. Supp. —— [55 LRRM 2798], is not to the contrary. That case represents legitimate concern for the maintenance of the status quo pending the expiration of Public Law 88–108.

riers and Organizations as a matter of practice treat each notice independently. *Monon R.R.* v. *Brotherhood of Railroad Trainmen,* N.D.Ill., 1963, 215 F. Supp. 430; *Pullman Co.* v. *Order of Ry. Conductors,* 7 Cir., 1963, 316 F. 2d 556. The November 2, 1959, notice was not superseded by the September 25, 1963, notice. *Order of Railway Conductors* v. *Louisville & Nashville R.R.,* 1964, —— F. 2d —— [No. 20,714, April 20, 1964].

We restate. The FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963,[28] and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and

[28] We need not here decide whether under applicable precedent, the FEC's insistence on the presence of a reporter at the Monson Hotel bargaining session constituted a refusal to bargain. It is clear that until the Mediation Board disposes of this matter, FEC must comply with the Union Shop agreement.

scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire.

AFFIRMED IN PART.
REVERSED AND REMANDED IN PART.

APPENDIX D

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, provides:

45 U.S.C. 151a. General purposes.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * * *

45 U.S.C. 152. General duties.

> *First. Duty of carriers and employees to settle disputes.*
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation

of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the

representative of the craft or class for the purposes of this chapter * * *.

Tenth. Violations; prosecution and penalties.

The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition

of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

45 U.S.C. 155. Functions of Mediation Board.

First. Disputes within jurisdiction of Mediation Board.

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

45 U.S.C. 156. Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. 160. Emergency Board.

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the

judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

U.S. GOVERNMENT PRINTING OFFICE: 1966